



**DEPARTMENT OF TRANSPORTATION**

**[4910-22-P]**

**Federal Highway Administration**

**[FHWA Docket No. FHWA-2018-0004]**

**Surface Transportation Project Delivery Program; Florida DOT Audit #1 Report**

**AGENCY:** Federal Highway Administration (FHWA), U.S. Department of Transportation (DOT).

**ACTION:** Notice, request for comment.

**SUMMARY:** The Surface Transportation Project Delivery Program allows a State to assume FHWA's environmental responsibilities for review, consultation, and compliance for Federal highway projects. When a State assumes these Federal responsibilities, the State becomes solely responsible and liable for carrying out the responsibilities it has assumed, in lieu of FHWA. This program mandates annual audits during each of the first 4 years of State participation to ensure compliance with program requirements. This is the first audit of the Florida Department of Transportation's (FDOT) performance of its responsibilities under the Surface Transportation Project Delivery Program (National Environmental Policy Act (NEPA) assignment program). This notice announces and solicits comments on the first audit report for the FDOT's participation in accordance to FAST Act requirements.

**DATES:** Comments must be received on or before [INSERT DATE 30 DAYS FROM THE DATE OF THIS NOTICE]

**ADDRESSES:** Mail or hand deliver comments to Docket Management Facility: U.S. Department of Transportation, 1200 New Jersey Avenue SE. Room W12-140, Washington, DC 20590. You may also submit comments electronically at

www.regulations.gov. All comments should include the docket number that appears in the heading of this document. All comments received will be available for examination and copying at the above address from 9 a.m. to 5 p.m., e.t., Monday through Friday, except Federal holidays. Those desiring notification of receipt of comments must include a self-addressed, stamped postcard or you may print the acknowledgment page that appears after submitting comments electronically. Anyone is able to search the electronic form of all comments in any one of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, or labor union). The DOT posts these comments, without edits, including any personal information the commenter provides, to www.regulations.gov, as described in the system of records notice (DOT/ALL-14 FDMS), which can be reviewed at www.dot.gov/privacy.

**FOR FURTHER INFORMATION CONTACT:** Ms. Marisel Lopez Cruz, Office of Project Development and Environmental Review, (202) 493-0356, marisel.lopez-cruz@dot.gov, or Mr. David Sett, Office of the Chief Counsel, (404) 562-3676, david.sett@dot.gov, Federal Highway Administration, Department of Transportation, 61 Forsyth Street 17T100, Atlanta, GA 30303. Office hours are from 8:00 a.m. to 4:30 p.m., e.t., Monday through Friday, except Federal holidays.

**SUPPLEMENTARY INFORMATION:**

**Electronic Access**

An electronic copy of this notice may be downloaded from the specific docket page at www.regulations.gov.

## **Background**

The Surface Transportation Project Delivery Program (or NEPA Assignment Program) allows a State to assume FHWA's environmental responsibilities for review, consultation, and compliance for Federal highway projects. This provision has been codified at 23 U.S.C. 327. When a State assumes these Federal responsibilities, the State becomes solely responsible and liable for carrying out the responsibilities it has assumed, in lieu of FHWA. The FDOT published in the *Florida Administrative Register* its application for assumption under the NEPA Assignment Program on April 15, 2016, and made it available for public comment for 30 days. After considering public comments, FDOT submitted its application to FHWA on May 31, 2016. The application served as the basis for developing the memorandum of understanding (MOU) that identifies the responsibilities and obligations FDOT would assume. The FHWA published a notice of the draft MOU in the Federal Register on November 1, 2016, with a 30-day comment period to solicit the views of the public and Federal agencies. After the close of the comment period, FHWA and FDOT considered comments and proceeded to execute the MOU. Effective December 14, 2016, FDOT assumed FHWA's responsibilities under NEPA, and the responsibilities for reviews under other Federal environmental requirements.

Section 327(g) of Title 23, United States Code, requires the Secretary to conduct annual audits during each of the first 4 years of State participation. After the fourth year,

the Secretary shall monitor the State's compliance with the written agreement. The results of each audit must be made available for public comment. This notice announces the availability of the first audit report for FDOT and solicits public comment on same.

Authority: Section 1313 of Public Law 112-141; Section 6005 of Public Law 109-59; Public Law 114-94; 23 U.S.C. 327; 49 CFR 1.85; 23 CFR 773.

Issued on: April 11, 2018.

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Brandye L. Hendrickson,  
Acting Administrator,  
Federal Highway Administration.

**DRAFT**  
**Surface Transportation Project Delivery Program**  
**FHWA Audit #1 of the Florida Department of Transportation**  
**December 2016 to May 2017**

**Executive Summary**

This is the first audit of the Florida Department of Transportation's (FDOT's) performance of its responsibilities under the Surface Transportation Project Delivery Program (National Environmental Policy Act (NEPA) assignment program). Under the authority of 23 United States Code (U.S.C.) 327, FDOT and Federal Highway Administration (FHWA) executed a memorandum of understanding (MOU) on December 14, 2016, whereby FHWA assigned and FDOT assumed FHWA's NEPA responsibilities and liabilities for Federal-aid highway projects and other related environmental reviews for transportation projects in Florida.

The FHWA formed a team in January 2017 to conduct an audit of FDOT's performance according to the terms of the MOU. The Audit Team held internal meetings to prepare for an on-site visit to the Florida Division and FDOT offices. Prior to the on-site visit, the Audit Team reviewed FDOT's NEPA project files, FDOT's response to FHWA's pre-audit information request (PAIR), and FDOT's Self-Assessment Summary Report of its NEPA program. The Audit Team conducted interviews with FDOT and resource agency staff and prepared preliminary audit results from October 16 to 20, 2017. The Audit Team presented these preliminary observations to FDOT Office of Environmental Management (OEM) leadership on October 20, 2017.

Upon accepting the NEPA assignment responsibilities, FDOT updated its procedures and processes as required by the MOU. Overall, the Audit Team found that FDOT is committed to establishing a successful NEPA program. This report describes several successful practices, three observations, and one non-compliance observation. The FDOT has carried out the responsibilities it has assumed in keeping with the intent of the MOU and FDOT's Application. Addressing the observations in this report will allow FDOT to continue to move the program toward success.

**Background**

The purpose of the audits performed under the authority of 23 U.S.C. 327 is to assess a State's compliance with the provisions of the MOU as well as all applicable Federal

statutes, regulations, policies, and guidance. The FHWA's review and oversight obligation entails the need to collect information to evaluate the success of the NEPA Assignment Program; to evaluate a State's progress toward achieving its performance measures as specified in the MOU; and to collect information for the administration of the NEPA Assignment Program. This report summarizes the results of the first audit in Florida. Following this audit, FHWA will conduct three annual audits. The second audit report will include a summary discussion that describes progress since the last audit.

## **Scope and Methodology**

The overall scope of this audit review is defined both in statute (23 U.S.C. 327) and the MOU (Part 11). An audit generally is defined as an official and careful examination and verification of accounts and records, especially of financial accounts, by an independent unbiased body. With regard to accounts or financial records, audits may follow a prescribed process or methodology and be conducted by "auditors" who have special training in those processes or methods. The FHWA considers this review to meet the definition of an audit because it is an unbiased, independent, official and careful examination and verification of records and information about FDOT's assumption of environmental responsibilities.

The Audit Team consisted of NEPA subject matter experts from the FHWA offices in Juneau, Alaska, Denver, Colorado, Columbus, Ohio, Washington, District of Columbia, Atlanta, Georgia, Austin, Texas, as well as staff from the FHWA Florida Division. The diverse composition of the team, as well as the process of developing the review report and publishing it in the *Federal Register*, are intended to make this audit an unbiased official action taken by FHWA.

The Audit Team conducted a careful examination of FDOT policies, guidance, and manuals pertaining to NEPA responsibilities, as well as a representative sample of FDOT's project files. Other documents, such as the June 2017 Six-month status update report from FDOT, the August 2017 PAIR responses, and FDOT's September 2017 Self-Assessment Summary Report, informed this review. The Audit Team interviewed FDOT staff and resource agency staff. This review is organized around six NEPA assignment program elements: program management, documentation and records management, quality assurance/quality control (QA/QC), legal sufficiency, performance measurement, and training program. In addition, the Audit Team considered three cross-cutting focus areas: (1) Engineering Analysis within the NEPA process; (2) Archaeological and Historical Resources; and (3) Protected Species and Habitat.

The Audit Team defined the timeframe for highway project environmental approvals subject to this first audit to be between December 2016 and May 2017, when 209 projects were approved. The team drew both representative and judgmental samples totaling 77 projects from data in FDOT's online file system, Statewide Environmental Project Tracker (SWEPT). In the context of this report, Type 1 CE and Type 2 CE are consistent with FDOT's Project Development and Environmental Manual. The FHWA judgmentally selected all Type 2 categorical exclusions (CEs) (3 projects), all reevaluations (12 projects), all Environmental Assessments (EAs) with Findings of No Significant Impacts (FONSI) (3 projects), all Environmental Impact Statements (EISs) with Records of Decision (RODs) (no projects fell into this category), and all Type 1 CE projects completed under 23 CFR 771.117(d) CE (9 projects). Fifty randomly selected project files came from the remaining 182 Type 1 CEs completed under 23 CFR 771.117(c), applying a 90 percent confidence level and a 10 percent margin of error to the sample. The Audit Team reviewed projects in all FDOT's seven districts.

The Audit Team submitted a PAIR to FDOT that contained 55 questions covering all six NEPA assignment program elements. The FDOT responses to the PAIR were used to develop specific follow-up questions for the on-site interviews with FDOT staff.

The Audit Team conducted a total of 42 interviews. Interview participants included staff from four of FDOT's seven district offices -- District 1 (Bartow), District 2 (Lake City), District 5 (Deland), and District 7 (Tampa) -- and FDOT Central Office. The audit team interviewed FDOT environmental staff, middle management, and executive management, regional representatives from the U.S. Army Corps of Engineers (USACE), U.S. Fish and Wildlife Service (USFWS), and the State Historic Preservation Officer (SHPO) from the Florida Department of State, Division of Historic Resources.

The Audit Team compared the procedures outlined in FDOT policies and environmental manuals (including the published 2016 Project Development & Environment (PD&E) Manual) to the information obtained during interviews and project file reviews to determine if there are discrepancies between FDOT's performance and documented procedures. Individual observations were documented during interviews and reviews and combined under the six NEPA Assignment Program elements. The audit results are described below by program element.

## **Overall Audit Opinion**

The Audit Team recognizes that FDOT is in the early stages of the NEPA Assignment Program and FDOT's programs, policies, and procedures may still be in the process of being incorporated into its program statewide. The FDOT's efforts have been focused on establishing and refining policies, procedures and guidance documents; establishing the SWEPT tracking system for "official project files"; training staff; establishing a QA/QC Plan; and conducting a self-assessment for monitoring compliance with the assumed responsibilities. The FDOT has carried out the responsibilities it has assumed consistent with the intent of the MOU and FDOT's Application. By addressing the observations in this report, FDOT will continue to move the program toward success.

### **Non-Compliance Observation**

A non-compliance observation is an instance where the Audit Team finds the State is not in compliance or is deficient with regard to a Federal regulation, statute, guidance, policy, State procedure, or the MOU. Non-compliance may also include instances where the State has failed to secure or maintain adequate personnel and or financial resources to carry out the responsibilities they have assumed. The FHWA expects the State to develop and implement corrective actions to address all non-compliance observations.

The Audit Team identified one non-compliance observation during this first audit.

### **Observations and Successful Practices**

Observations are items the Audit Team would like to draw FDOT's attention to, which may improve processes, procedures, and/or outcomes. The Audit Team identified four observations in this report. Successful practices are practices that the Audit Team believes are successful, and encourages FDOT to consider continuing or expanding those programs in the future. The Audit Team identified several successful practices in this report. All six MOU program elements are addressed here as separate discussions.

The Audit Team acknowledges that sharing the draft audit report with FDOT allows the Agency to begin implementing corrective actions to improve the program. The FHWA will also consider the status of these observations as part of the scope of Audit #2.

### **Program Management**

#### *Successful Practices*



The Audit Team learned that FDOT has maintained its good working relationship with the three resource agencies interviewed -- USFWS, USACE, SHPO. Each agency stated that FDOT coordinated any changes in their program with the Agency to ensure satisfaction with their regulatory requirements.

*Observation 1: FDOT environmental commitment documentation and tracking*

The Audit Team noted in interviews and project file reviews that FDOT's environmental commitments were inconsistently documented, tracked, and implemented. During the interviews, OEM and district staff indicated a different understanding of how commitment compliance is accomplished in FDOT and the function and use of the Project Commitment Record (PCR) Form. District staff have developed different tools than the PCR to track commitment compliance. Both the Self-Assessment Summary Report and project file reviews indicated that commitments were not being included verbatim into the Commitments Section of some NEPA documents or reevaluations. The Audit Team noted that commitments are not consistently transferred onto PCR forms for tracking through the various phases of project development. The Audit Team encourages FDOT to implement the commitment compliance recommendations identified in their 2017 Self-Assessment Summary Report to address this observation.

*Observation 2: FDOT Program level coordination to address MOU requirements*

During the audit interviews, FDOT stated they are implementing new Federal or U.S. Department of Transportation (DOT) policy, including executive orders, without FHWA consultation. This approach may establish policy or guidance in advance of FHWA, which could increase the risk of conflict with any subsequent DOT/FHWA issued policy or guidance. If such a conflict should occur, FDOT would then need to change their policies and procedures to meet the DOT/FHWA guidance. According to MOU subpart 5.2.1 FDOT may not establish policy and guidance on behalf of the DOT Secretary or FHWA for highway projects covered in the MOU.

## **Quality Assurance/Quality Control**

*Successful Practices*

The FDOT has implemented several successful practices to ensure the quality of its NEPA documents. As an example of a successful QA/QC practice, one district developed a checklist to provide better quality control in making sure they were uploading the necessary information into SWEPT for project review and coordination. As they received comments from OEM, the district adjusted their checklist so that future projects would also benefit from the OEM comments.

*Observation 3: FDOT's approach to QA/QC could be broadened and made more responsive*

The FDOT's QA/QC tool was the self-assessment. The FDOT's self-assessment considered five focus areas for compliance: commitments; ponds; species and habitat; QA/QC; and Type 1 CE projects. Both FHWA and FDOT reviewed the same 27 projects (exclusive of Type I CEs completed under 23 CFR 771.117(c)) and identified a similar number of projects with documentation issues for the focus areas in common (commitments and species and habitat). However, the Audit Team identified additional project documentation or compliance issues not identified by FDOT. While the FHWA acknowledges that FDOT has employed quality assurance as a corrective action to address missing information for projects, FDOT's obligation under the MOU is that its QA/QC process identify and address the full range of compliance obligations it has assumed. Though concentrating on focus areas is appropriate for a Self-Assessment Summary Report, FDOT's QA/QC overall process should be broader in scope in order to identify and correct any deficiencies.

### **Legal Sufficiency**

The Audit Team's review of FDOT's legal sufficiency program found that FDOT has structured the legal sufficiency process for the NEPA Assignment Program by having in house counsel as well as being able to contract with outside counsel who have NEPA experience. Because FDOT is in the early stages of implementation, no legal sufficiency determinations have been made during the audit time frame.

### *Successful Practices*

The FDOT Office of General Counsel (OGC) is fully engaged in the NEPA process. Legal staff participate in monthly coordination meetings and topic specific meetings with OEM and the districts. They also review other documents as requested for legal input. There is close collaboration throughout the process among OGC, OEM, the districts, and districts' attorneys.

Based on the information provided, the FDOT OGC is adequately staffed to provide management and oversight of the NEPA assignment process. In addition, FDOT attorneys located in each of the seven districts provide supplemental support to the dedicated NEPA OGC staff as needed.

### **Training Program**

### *Successful Practices*

The Audit Team learned through interviews that employee training is a corporate priority at FDOT. The FDOT's training is considered a successful practice in four respects:

First, FDOT developed its own on-line NEPA Assignment training. These succinct Web-based training videos address new NEPA assignment processes, including performance measures, the FHWA audit process, QA/QC, and the FDOT self-assessment process. Such training contributes to a consistent understanding of and participation in these aspects of the NEPA Assignment Program among all FDOT staff.

Second, FDOT provides employees ample training opportunities. Employees are notified of those opportunities through training coordinators and the Learning Curve system, which provides a library of courses. The training helps FDOT employees understand new roles and responsibilities and is available as needed. In preparation for NEPA Assignment, OEM also provided several in-person sessions for the districts. The training was recorded and is available on line.

Third, FDOT employees are required to have an Individual Training Plan (ITP). The plan includes required subject matter courses and courses that promote development of technical and leadership skills.

Finally, training is integrated into employee performance evaluations and employees' ITPs are discussed with supervisors on an annual basis, thereby emphasizing the importance of training and promoting compliance with training requirements. Completion of training is incorporated into the employees' and supervisors' performance evaluations.

### **Performance Measures**

The FDOT presented a discussion of their performance measures that implement those listed in MOU Section 10.2 in the July 2017 revision of their QA/QC Plan. In that discussion, FDOT developed several sub-measures along with performance targets, responsible parties, relevant processes, and desired outcomes identified (see Appendix A of the Plan- [http://www.fdot.gov/environment/sched/files/APPROVED-FDOT-OEM-QAQC-Plan\\_-Dec222017-revised2017-0712.pdf](http://www.fdot.gov/environment/sched/files/APPROVED-FDOT-OEM-QAQC-Plan_-Dec222017-revised2017-0712.pdf) ). This plan also identifies FDOT's method of performance monitoring using SWEPT as well as how OEM will, when needed, take corrective action to improve performance.

The FDOT Self-Assessment Summary Report contained the results of FDOT's first report of its assessment of the NEPA Assignment Program and FDOT procedures compliance. This assessment, for the period between December 14, 2016, and April 30, 2017, entailed review of project files as well as results from a survey of Agency satisfaction. The report also included a discussion of FDOT's progress in attaining performance results.

#### *Successful Practices*

The FDOT has demonstrated it has taken an active interest in developing, monitoring, and implementing the performance measures as required by the MOU. In reviewing Section 3 of the FDOT Self-Assessment Summary Report, the Audit Team noted that FDOT is the first NEPA assignment State to create a training module on performance measures. This module, available to all FDOT staff, explains performance metrics, how the measures are computed in SWEPT, performance monitoring, and how the measures appear in FDOT's annual Self-Assessment Summary Report. During the interviews, FDOT's leadership indicated that they wanted performance measures to account for, objectively measure, and use quantitative data to support FDOT performance. They also made it clear that FDOT is measuring something worthwhile and plans to revisit the performance metrics over time.

### **Documentation and Records Management**

The SWEPT has been identified as FDOT's project file of record, in which FDOT maintains approved reevaluations, CEAs, EAs, and EISs. The Electronic Review and Comments (ERC) system is an internal tool to capture review and comments on the environmental documents. During the audit interviews, FDOT staff indicated only final documents are maintained in the SWEPT system. The Audit Team has full access to SWEPT but has no access to ERC.

#### *Successful Practices*

- The FHWA commends FDOT's use of the ERC system to document internal review and comments on NEPA documents and to maintain a record of the disposition of those comments.
- The FDOT's statewide implementation of SWEPT as the administrative file of record used for decision making and documenting compliance with the NEPA

process facilitated the Audit Teams review of project files. The following features are particularly notable:

- The date-stamping of data in SWEPT is used for performance measurement tracking.
- The SWEPT, with its Bates stamping ability, facilitates administrative records and open records request compilations.
- The June 2017 SWEPT update includes Type 1 CE “smartforms” which provide internal controls that increases certainty of NEPA compliance.

*Non-Compliance Observation 1: Some FDOT project files contain insufficient documentation to support the environmental analysis or decision*

Both the MOU (subpart 10.2.1) and FDOT’s PD&E Manual specify that documentation is needed to support compliance. The Audit Team observed that forty-seven (47) of the seventy-seven (77) project files reviewed did not have sufficient documentation in SWEPT to support the environmental analysis or NEPA decision. The FDOT Self-Assessment reached similar conclusions, and identified nine (9) of thirty-six (36) projects having insufficient documentation. The Audit Team could not determine if the discrepancy indicated documentation had not been uploaded into SWEPT or if the required process had not been completed. The team provided a list of these projects along with a draft of this report to FDOT for their review and comment. The FDOT provided their comments on this report, but did not provide additional information to clarify whether documentation was not uploaded or a required process was not completed.

The FDOT has committed to comply with all applicable environmental review requirements to highway projects it has assumed and to maintain documentation of this compliance. The file review of projects, most, but not all, of which were processed with a categorical exclusion, identified the following deficiencies in supporting documentation: 1) missing or outdated technical documents referenced in the NEPA document; 2) using FDOT standard specifications for Endangered Species Act compliance instead of conducting consultation when species are known to be present, missing documentation of consultation, missing impacts analysis, missing documentation which concludes with a finding, and missing concurrence documentation from applicable agencies; 3) missing documentation of Section 106 consultation, 4) missing or incorrect documentation for fiscal constraint (for several levels of documents including Type 1 CEs); 5) missing environmental commitments identified in technical reports, and

commitments not carried forward in reevaluations; 6) missing Section 4(f) impacts/avoidance analysis; 7) missing documentation to support floodplain effects finding; 8) missing documentation to support the wetlands finding; 9) missing documentation for Essential Fish Habitat consideration; 10) missing documentation of community and other resources impacts when addressing ROW changes; and 11) missing documentation of water quality considerations.

The FDOT has informed the Review Team that they have implemented some corrective actions to address missing documentation. The FDOT staff interviews revealed that the SWEPT system was updated to include a control to not allow a project file review to be completed without uploading all supporting documentation. The FDOT believes that this system improvement will ensure that supporting documentation, that was sometimes missing as SWEPT was initially implemented would now be present prior to an approval point. The implementation of these improvements was incorporated after the audit project file review time frame.

### **Next Steps**

The FHWA provided a draft of the audit report to FDOT for a 14-day review and comment period, later extended to 21-days due to the holidays occurring during the review period. The Audit Team considered FDOT's comments in this draft audit report. The FHWA will publish a notice in the *Federal Register* for a 30-day comment period in accordance with 23 U.S.C. 327(g). No later than 60 days after the close of the comment period, FHWA will address all comments submitted to finalize this draft audit report pursuant to 23 U.S.C. 327(g)(B). Subsequently, FHWA will publish the final audit report in the *Federal Register*.

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